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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

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3 LINDA EVANGELISTA,

4 Plaintiff,

5 v.

21-cv-7889 (VEC)

6 ZELTIQ AESTHETICS, INC.,

7 Defendant.

Conference

8 -----x

9 New York, N.Y.  
(remote)

10 December 7, 2021  
11 4:00 p.m.

12 Before:

13 HON. VALERIE E. CAPRONI

14 District Judge

15  
16 APPEARANCES

17 WROBEL MARKHAM LLP  
Attorneys for Plaintiff  
18 BY: JENNIFER M. MULLER  
JODIE GERARD  
19 DANIEL F. MARKHAM

20 SILLS CUMMIS & GROSS, P.C.  
Attorneys for Defendant  
21 BY: BETH S. ROSE  
VINCENT R. LODATO  
22 -and-  
BUTLER SNOW LLP  
23 Attorneys for Defendant  
24 BY: ALYSON B. JONES  
ORLANDO R. RICHMOND SR.

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(Remote)

THE COURT: Hi. This is Judge Caproni. Who just joined?

MS. JONES: Alyson Jones from Butler Snow on behalf of Zeltiq.

THE COURT: We're still waiting for the plaintiff to join.

MS. JONES: OK. Thank you.

THE COURT: Hi. This is Judge Caproni. Who just joined?

MR. MARKHAM: Hi, your Honor. This is Dan Markham. I'm counsel for the plaintiff, Linda Evangelista.

THE COURT: OK. That means we've got everybody.

Let me remind everybody of the rules of a telephone conference. If you're in an area where there's ambient noise, please mute your phone when you're not talking. Please identify yourself each time before you speak. And if you hear the bell that indicates someone has come or left, please stop talking long enough for me to make sure that I still have the court reporter on the line.

I understand that this is a discovery dispute specifically over the scope of medical records that the defendant has requested. Mr. Markham, why don't you lay out what you're objecting to.

MR. MARKHAM: OK, your Honor. Thank you.

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1           Just as a background, before this case was even filed,  
2 we supplied four medical releases for four different providers  
3 who either performed the procedures at issue in the case or who  
4 performed follow-up surgeries to try to repair the damage that  
5 was caused by the CoolSculpting procedures. And to that end,  
6 we've produced already before this case was filed 8 gigabytes  
7 of information.

8           Contained in that information, those medical records,  
9 are names of other providers that my client has seen over the  
10 years, including her oncologist, her general practitioner, etc.  
11 We have asked defendant's counsel to justify why, for example,  
12 my client's cancer records would be relevant to the claims that  
13 she has asserted.

14           Now, I understand she put her mental condition at  
15 issue, claiming mental anguish, and we've already sent over a  
16 medical release for her therapist. But these other doctors do  
17 not have any bearing on the pain and suffering or the physical  
18 damages that she's alleged that were caused by the  
19 CoolSculpting procedure.

20           And so we've had colloquy, emails, and phone calls  
21 trying to limit at least some of the concerns that defendant's  
22 counsel have had, and we've tried to work through specific  
23 interests that they may have that we may be able to provide  
24 information regarding, but we will not -- well, we have not --  
25 agreed to an unfettered rummaging through my client's medical

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1 records.

2 THE COURT: So.

3 MR. MARKHAM: That's where we are at.

4 THE COURT: Well, to be clear, this is an issue of the  
5 oncologist and the general practitioner? Is there any other  
6 particular healthcare provider that the plaintiff is objecting  
7 to providing the releases for?

8 MR. MARKHAM: Yes, your Honor. So if I go down the  
9 list, there are six doctors. One is a GP. One is her  
10 oncologist. One is the surgeon who performed surgery relating  
11 to her cancer. One is a geneticist. One is a plastic surgeon  
12 who performed some plastic surgery well before my client had  
13 ever undergone CoolSculpting procedures. And the sixth doctor  
14 is a gastroenterologist, which is, you know, her stomach issues  
15 are not at all at issue in this case.

16 THE COURT: All right. So, Ms. Jones, why do you need  
17 all these records?

18 MS. JONES: Yes. Specifically, our position is that  
19 we are entitled to the full medical history as it relates to  
20 her, first the physical condition and her mental health status,  
21 because they are the exact injuries she's putting at issue.  
22 Ms. Evangelista specifically claims that she's unable to work  
23 and that she has been permanently disfigured with respect to  
24 the physical injuries.

25 And so, in order for us to sufficiently obtain and

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1 discover relevant information to her claimed damages, we are  
2 entitled to collect medical records as it relates to  
3 specifically the providers he referenced that have been  
4 referenced, but those are the only ones identified by a very  
5 small subset of records that has been provided to date.

6           How this came about is, because the Court has a  
7 deadline of November 19, 2021 to provide a medical  
8 authorization, we requested that plaintiff provide a general  
9 authorization that would allow us to determine the relevant  
10 providers and to collect the medical records, to which  
11 plaintiff's counsel objected, and now we're trying to work  
12 through a more -- a list. And this is a process by which we  
13 identify a specific provider and then he'll either object or  
14 tell us -- or give us the authorization, which is going to be a  
15 very piecemeal fashion as we continue through this litigation.  
16 And so our request is actually that she be required to execute  
17 a general authorization for both her medical records and her  
18 psychological records so that we can identify the relevant  
19 providers and collect the records. And so that is why we've  
20 raised this with the Court.

21           I will mention that this is preliminary, meaning that  
22 our responsive pleading is due a week from today, December 14,  
23 in which we'll be moving to dismiss the claims. And so this is  
24 putting a discovery dispute ahead of those determinations, but  
25 in accordance with the deadlines that have been set by the

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1 Court for discovery, a fundamental part of that is our ability  
2 to collect medical records. We don't know what we don't know.  
3 We have to have the record, in a personal injury lawsuit where  
4 she's put the issues at the forefront. These are her claimed  
5 damages. And we are entitled to collect records in order to  
6 determine -- even to determine what the status of her damages  
7 are.

8 And this is not admissibility at this point, and this  
9 is not a fishing escapade or trying to get into her -- areas  
10 that are not relevant, but this is just a discoverability  
11 issue, and the medical records are central to her claim  
12 damages.

13 MR. MARKHAM: Your Honor, may I respond? This is Dan.

14 THE COURT: Yes, Mr. Markham.

15 MR. MARKHAM: I would just say that whatever --  
16 everything that Ms. Jones has said, unfortunately, that's not  
17 the law in New York State or in this district. And the case  
18 law is clear that when a plaintiff puts her medical or mental  
19 condition at issue, she only waives her privacy rights as to  
20 that particular ailment that has caused her emotional distress  
21 or injury.

22 THE COURT: How do they -- I'm sorry. Let me  
23 interrupt you for a second.

24 MR. MARKHAM: Yes.

25 THE COURT: What defendant is saying is, your client

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1 is saying that she is unable to work because of their,  
2 whatever, their device or their product or their -- whatever --  
3 I'm not sure what we call this thing, but whatever. And  
4 they're entitled to defend on the grounds of, that's not true,  
5 your client is unable to work because she had cancer, because  
6 of the surgery from the cancer, because of some other medical  
7 condition that is interfering with her ability to work.

8 MR. MARKHAM: Well, I understand that, your Honor, but  
9 what they've asked for is a general medical authorization to go  
10 into every doctor my client has ever seen and rummage through  
11 her medical records. That's just not the way things are done  
12 in the Southern District in my experience or in New York State.

13 So to the extent -- and I've had this conversation  
14 with Ms. Jones -- to the extent that she can -- like, for  
15 example, she raised my client's weight. To the extent that  
16 there are records in her general -- her GP medical records that  
17 go to her weight, maybe -- you know, I agree. If she was --  
18 since she had a weight problem, for a model, before the  
19 CoolSculpting procedures, that's relevant. We'd be happy to  
20 share that information. It's just that this, you know,  
21 "Provide me with medical records for doctors, I don't even know  
22 who they are, and we're going to go and look at all your  
23 medical records," that's way overbroad and that is something  
24 that the courts in this district have never allowed.

25 THE COURT: Well, but at the moment what we're talking

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1 about, while it is true that Ms. Jones would like a general  
2 medical release, at the moment what you've identified is an  
3 oncologist, a general practitioner, a surgical oncologist --  
4 put aside the geneticist for a second. I'm having some  
5 difficulty understanding the relevance of that. Plastic  
6 surgery, surgeon, you say from well before the CoolSculpting  
7 but I don't know what that means. And a gastroenterologist.  
8 All of whom I could see, again other than the geneticist,  
9 having information that would be relevant to whether it was the  
10 CoolSculpting procedure that made her unable to work or whether  
11 there were other medical conditions that are interfering with  
12 her ability to work.

13 When was the CoolSculpting procedure done?

14 MS. JONES: 2015.

15 MR. MARKHAM: Sorry. There were seven procedures.  
16 They started in August of 2015 and went through February of  
17 2016. And it wasn't until several months after the last  
18 treatment that she developed this, we call it PAH, paradoxical  
19 adipose hyperplasia, hardened fat tissue that protrudes from  
20 her body wherever the device was placed.

21 THE COURT: Why isn't one way of skinning this cat,  
22 put a time limit on the records that the defendant can get.  
23 And there's a point where if they're very remote in time I  
24 can't possibly see how they're relevant, how they're  
25 sufficiently relevant to warrant discovery. Ms. Jones?



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1 MS. JONES: Yes. We can agree, I agree that that  
2 limitation would be appropriate. And it could be from the date  
3 of her CoolSculpting treatment, and so three years prior, which  
4 was August 2015, would be -- we would understand that there  
5 could be a limitation for that. I would maybe argue five years  
6 but I would agree to three years.

7 THE COURT: Three years before the beginning of the  
8 CoolSculpting?

9 MS. JONES: Correct.

10 THE COURT: Mr. Markham?

11 MR. MARKHAM: Well, my experience in the Southern  
12 District, your Honor, is that three years is often considered  
13 to be a reasonable amount of time. So I could not object to a  
14 three-year, you know, retroactive period.

15 THE COURT: So medical records, then, from August 2012  
16 forward.

17 MR. MARKHAM: Right.

18 THE COURT: OK?

19 For these -- why do you need the geneticist,  
20 Ms. Jones?

21 MS. JONES: The geneticist, Ms. Evangelista, from our  
22 review, again a review of a limited set of records, these are  
23 the initial physicians we've been able to identify, the  
24 geneticist, she has a condition that is specific -- that will  
25 prevent her from being able to -- I don't know the full extent

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1 of it, but it does cause her some potential fatigue and  
2 inability to kind of function as a normal person. And that may  
3 lead to her inability to work. And it also may cause some type  
4 of skin, like lesions. She is a model. And so any kind of  
5 physical appearance that would keep her from being able to be  
6 on the cover of a magazine, for example, would be relevant to  
7 her damages. So that's my understanding. But it is a very  
8 rare genetic condition, and I don't know the full extent of it  
9 yet.

10 MR. MARKHAM: Right.

11 THE COURT: Well, Mr. Markham, what's this normal -- I  
12 am not an expert of this, but my understanding of what  
13 geneticists do, geneticists are typically providing advice on  
14 whether conditions will be passed on to children or if there's  
15 a reason why, from a genetic perspective, people should not be  
16 having children or what the risks are, etc. Why was she at a  
17 geneticist?

18 MR. MARKHAM: Well, your Honor, that, I'll be honest  
19 with you, I haven't -- I haven't asked her a specific question  
20 why she was at the geneticist. I can tell you that, from 1984  
21 through 2016, she was possibly the most photographed model in  
22 the world. So there were, you know, based on that alone, there  
23 was -- lesions on her face or anything that could prevent her  
24 from working, she worked for those decades and was -- like I  
25 said, possibly the most photographed model in the world. So,

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1 you know --

2 THE COURT: OK.

3 MR. MARKHAM: I assume that being an issue here.

4 THE COURT: Let's put the geneticist on hold.

5 Ms. Jones, if you develop more information and there's  
6 something about the geneticist that has unique information that  
7 these other doctors don't have, then meet and confer, and if  
8 you can't work it out, come back to me. But for now, that  
9 seems, that one seems a little far afield, without having a  
10 better feel for why you're interested in it.

11 As to the other doctors that have been identified, so  
12 the oncologist, the general prac -- the GP, surgical  
13 oncologist, plastic sur -- when was the plastic -- you said the  
14 plastic surgery was from well before the CoolSculpting? When  
15 was it?

16 MR. MARKHAM: Well, my understanding -- she, to the  
17 best of her recollection, it was several years before the first  
18 CoolSculpting. So that would have been in 2015. So we're  
19 talking a few years before then.

20 THE COURT: OK. Well then --

21 MR. MARKHAM: And there was some eye work done, work  
22 done under her eye.

23 THE COURT: OK. Unlikely to be particularly relevant,  
24 but if it's within the three years, provide it. If not, you  
25 don't have to provide it. Same with the gastroenterologist.

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1 MR. MARKHAM: OK.

2 MS. JONES: Yes, your Honor. And if I could just  
3 interject one thing with specificity to plastic surgeons and  
4 just for the benefit of if we have to have continued  
5 conversations about this. So the process of consenting is  
6 going to be at issue here. And so to the extent that there's  
7 consenting that's done in particular in reference to plastic  
8 surgery, that would be of specific relevance to the claims at  
9 issue as well. So I just raise that with respect to plastic  
10 surgery, recognizing there's a time frame. I understand the  
11 Court's ruling on that.

12 THE COURT: OK. Anything further that I can do?

13 MR. MARKHAM: Not from my perspective, your Honor.  
14 Thank you.

15 THE COURT: Ms. Jones?

16 MS. JONES: No. This has been helpful. Thank you,  
17 your Honor.

18 THE COURT: All right. Thanks, everybody.

19 (Adjourned)  
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